very little criticism of his evidence. His was the only version before the court as to how the accident took place, and that version was in no way inconsistent with the damage to the two vehicles and the position at which they were found after the impact. In the absence of anything to show that there are inherent improbabilities about the plaintiff's evidence, I do not see how it can be said that he had not proved his case on the balance of probabilities.

Counsel for the respondent submitted before us that the trial judge's finding is right but that his reasons for that finding are wrong. His main argument is that if the scooter kept on moving more and more to its right, as alleged by the plaintiff, the accident could not have taken place in the centre of the road. In other words, according to him, there is an inherent improbability in the plaintiff's story. The fallacy in that argument lies in the fact that there is no evidence that the accident took place in the centre of the road. In marking the spot on the plan at which the impact took place the plaintiff was indicating the approximate position, his evidence being that the impact took place on his side of the road, and he gave no evidence as to the extent of the encroachment of his path as the scooter kept on moving more and more to its right. There was certainly no evidence of the scooter suddenly darting out on to the path of the plaintiff. Moreover, the plaintiff testified that the scooter suddenly swerved towards its left. It was only when he was about three feet from the scooter that, in the agony of the moment in an attempt to save himself from the peril in which he was placed by the wrong action of the deceased, he swerved to the right in an endeavour to avoid the scooter, so that he cannot be said to have been guilty even of contributory negligence.

For the reasons I have stated there was no inherent improbability in the evidence of the plaintiff, so that he was entitled to succeed, and I would hold accordingly.

Coming to the question of damages, it is a matter for regret that the learned judge did not proceed to assess them on the assumption that the matter might go up to a higher court. As has been said in some cases before, it is very desirable for a trial judge to do so even if he comes to a finding that the action must fail. In the circumstances of the present case it falls on us to assess the damages, as both counsel have raised no objection to our doing so.

The injuries suffered by the plaintiff as a result of the accident are set out in his statement of claim and the report of Dr. I. A. Muthu. The plaintiff was discharged from the hospital on 13th May, 1962. He was again in hospital for 9 days from 25th April, 1965 for an operation on his right upper chest. On 18th November, 1965 he was examined by Mr. C. K. Young, Consultant Surgeon, General Hospital, Penang. The results of Mr. Young's examination are contained in his report of 22nd November, 1965 which is in the agreed bundle. In his evidence in court Mr. C. K. Young (P.W.1) said that the right arm of the plaintiff had lost all its functions, including the ability of holding anything in the right hand.

Before the accident the plaintiff was a coffin maker. His average monthly earnings, which were not seriously challenged by the defence, amounted to $240. On the basis of his loss of such earnings from the date of the accident to the date of the filing of the action (1st February, 1968), a period of 70 months, his counsel submitted that he should be allowed a sum of $16,800 by way of special damages. Counsel for the respondent, relying on the authority of *James* v. *Woodall Duckham Construction Co., Ltd.*[2] submitted that special damages by way of loss of earnings should not be allowed for the whole of the period as the plaintiff could have filed and brought his action to trial much earlier. In this connection it is to be observed that the plaintiff was re-admitted into hospital in November, 1965. He was examined by Mr. C. K. Young in the same month and a report on his condition was issued soon afterwards. Assuming that it took time for the official administrator to be appointed, there is no reason why a writ could not have been issued long before the 1st of February, 1968. On the other hand, special damages in respect of loss of earnings are normally allowed up to the date of the trial of the action. In all the circumstances of the case, I would award $10,000 as special damages. As regards general damages, to all intents and purposes the plaintiff has lost his right arm. Therefore, as in the case of *United Plywood and Sawmill Ltd.* v. *Lock Ngan Loi*,[3] I would award a global sum of $27,500 in respect of pain and suffering, loss of amenities and loss of future earnings. In the result I would allow the appeal, set aside the judgment of the learned trial judge and substitute therefor judgment for the plaintiff in the sum of $37,500 with costs to the appellant here and in the court below.

Suffian and **Ali F.JJ.** concurred.

Appeal allowed.

Solicitors: *Triptipal Singh & Co.*: *Skrine & Co.*

MALAYSIAN AUSTRALIAN FINANCE CO. LTD. v. THE LAW UNION & ROCK INSURANCE CO. LTD.

[O.C.J. (Mohamed Azmi J.) March 13, 1972]

[Kuala Lumpur — Originating Summons No. 349 of 1971]

Insurance — Motor insurance — Coverage — Policy taken out in accordance with terms of hire-purchase agreement — Endorsement on policy acknowledging finance company as owner of subject-matter — Whether finance company had co-extensive rights as insured in instituting claims.

Practice and Procedure — Declaration — Determination of rights — R.S.C. 1957, O. 54A.

This was an application under R.S.C., 1957, O. 54A, for the determination of two questions arising under a commercial vehicle policy of insurance dated June 29, 1968, issued by the respondent to one Choong Kok Hing, the insured.

At the commencement of the trial, however, it was agreed that there was only one question to be determined by the court, namely, whether the applicant had rights co-extensive as the said insured, Choong Kok Hing, in instituting claims in its own name against the respondent arising out of loss of the subject matter upon which coverage was

provided by the respondent by virtue of an endorsement appearing in the said policy of insurance.

Held: the applicant had rights co-extensive as the said insured Choong Kok Hing in instituting claims in its own name against the respondent arising out of loss of the subject matter upon which coverage was provided by the respondent by virtue of the endorsement dated June 29, 1968 appearing in the insurance policy.

Case referred to:-

(1) *Yangtsze Insurance Association, Ltd.* v. *Lukmanjee* [1918] A.C. 585.

ORIGINATING SUMMONS.

Chin Yew Meng for the applicant.

Chan Siew Yoon for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by originating summons under Order 54A of the Rules of the Supreme Court, 1957 for the determination of two questions arising under commercial vehicle policy of insurance No. KL/CV/1372 dated June 29, 1968 issued by the respondent to one Choong Kok Hing. At the commencement of the trial, however, it was agreed that there was only one question to be determined by the court, namely whether the applicant has rights co-extensive as the said insured Choong Kok Hing in instituting claims in its own name against the respondent arising out of loss of the subject matter upon which coverage was provided by the respondent by virtue of an endorsement appearing in the said policy of insurance to the following effect: —

"It is hereby understood and agreed that Messrs. Malaysian Australian Finance Co. Bhd. (hereinafter referred to as the Owners) are the owners of the Motor Vehicle and that the Motor Vehicle is the subject of a Hire Purchase Agreement made between the Owners of the one part and the Insured of the other part and it is further understood and agreed that the Owners are interested in any monies which but for this Endorsement could be payable to the Insured under this Policy in respect of loss of or damage to the Motor Vehicle (which loss or damage is not made good by repair reinstatement or replacement) and such monies shall be paid to the Owners as long as they are the owners of the Motor Vehicle and their receipt shall be a full and final discharge to the Company in respect of such loss or damage.

Save as by this Endorsement expressly agreed nothing herein shall modify or affect the rights and liabilities of the Insured or the Company respectively under or in connection with this Policy.

Dated this 29th day of June, 1968."

The following facts as contained in the affidavits sworn on behalf of the applicant and the respondent, do not appear to be in dispute. On April 27, 1968 Choong Kok Hing, a contractor, residing at No. 9, Gopeng Road, Kampar, purchased a caterpillar tractor on hire purchase under the terms and conditions appearing in the hire purchase agreement (see Exhibit B attached to applicant's supplementary affidavit affirmed on November 26, 1971) at a price of $195,000. Under the terms of the said hire purchase agreement, Choong Kok Hing had to insure the said tractor during the continuance of the hiring in the form acceptable to the applicant (as owner) and the insurers whereby the interest of the policy should be conveyed to the applicant in so far as the applicant might be affected by any claim thereunder. Pursuant to the aforesaid undertaking, Choong Kok Hing insured the said tractor with the respondent *vide* comprehensive commercial vehicle policy No. KL/CV/1372 for the period April 22, 1968 to April 21, 1969. The said policy was dated June 29, 1968, and it is clear from the first clause in the preamble that the proposal form submitted by Choong Kok Hing should be the basis of the contract of insurance. The relevant endorsement incorporated in the said policy wherein the applicant was acknowledged as the owner of the tractor was also dated June 29, 1968. In November 1968 Choong Kok Hing reported to the respondent the loss of the tractor and filed a formal claim on December 3, 1968, but the respondent disclaimed any liability to his claim.

The main question here is whether the applicant can be said to be a party to the contract of insurance; and, in my view, for the applicant to succeed, there must be evidence on which it can be found that the policy has been effected on behalf of the applicant or to cover the applicant's interest in the subject matter of the insurance policy. The case of *Yangtsze Insurance Association, Limited* v. *Lukmanjee*(1) has been cited by both counsel. In that case, Mr. Lukmanjee had paid for 144 teak logs shipped from Bangkok to Colombo and had become the owner of the goods as soon as they were discharged *ex* ship into the water. The policy there was effected by the Bombay, Burmah Trading Corporation, the sellers, at their own expense —

"as well in his or their own name as for and in the name and names of all and every person or persons, to whom the same doth, may, or shall appertain in part or in all'.

Mr. Lukmanjee claimed to have been assured under the policy and entitled to sue as a party to it, but it was held by the Judicial Committee of the Privy Council that on the facts, the policy was not intended to be taken out on his behalf to cover his interest. From the judgment of this case, which was delivered by Lord Sumner, it seems clear that Mr. Lukmanjee's case was rejected not upon the ground that in law he could never be a party to the policy and therefore could not enforce it, but upon the ground that he had failed to establish that the policy was effected on his behalf or to cover his interest. In the present case, however, it cannot be disputed that the applicant as owner has an immense interest in the subject matter of the policy. In fact, the policy was taken by the hirer, Choong Kok Hing, in pursuance to the terms and conditions as contained in the hire purchase agreement and the applicant has also ratified the purchase of the said policy. In the proposal form dated April 11, 1968, it was disclosed to the respondent that the tractor in question was subject to a hire purchase agreement and the applicant was specifically named therein as the owner. Further, the applicant's interest is endorsed on the policy and there can be no doubt that both Choong Kok Hing and the respondent knew that the policy was in a large measure effected on the applicant's behalf and for its benefit, although Choong Kok Hing was the only person described as the insured in the policy. The fact that the contractual rights of Choong Kok Hing to receive money has been subrogated, in that the applicant is given the prior right to receive money under the policy, shows, to my mind, that the policy has been effected by Choong Kok Hing on the

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applicant's behalf. Having regard to the hire purchase agreement, the proposal form and the insurance policy as a whole, it is reasonable to infer that the intention of Choong Kok Hing in effecting the policy and of the respondent in issuing the same, was primarily to cover the applicant's interest so long as the applicant was the owner of the tractor in question, although the policy did cover Choong Kok Hing's interest as well. The fact that the respondent has disclaimed any liability to Choong Kok Hing's claim does not affect the applicant's insurable interest in the policy. Monies could still be payable under the policy, and, as such, the applicant is a party to the contract and should be entitled to institute claims against the respondent in its own name.

Even if the applicant is a stranger to the contract of insurance and therefore cannot ordinarily sue on the basis of it, this general rule of law is not absolute and is subject to some exceptions which are definite and recognised. One of these exceptions is where there is a direct agreement to pay to or the respondent constitutes itself as the agent of the third party. This particular exception is illustrated at page 282 of *Sanjiva Row's* commentaries on Indian Contract Act and Law Relating to Tenders, 6th Edition, Volume 1, where the writer said:

"Yet another exception to the general rule is afforded where the promisor, between whom and the stranger no privity exists, creates privity by his personally agreeing with the stranger to pay him direct or becomes estopped from denying his liability to pay him personally."

The other exception is where a trust is created which is illustrated by *Sanjiva Row* at page 278 as follows:

"A third party who is to be benefited under a contract between *A* and *B* acquires equitable rights *ex contractu* if the agreement between the parties is so framed as to make one of them a trustee for the third party. In *Gandy* v. *Gandy* (1885) 30 Ch. D. 57 at 67, Cotton L.J. put the matter thus: 'If the contract, although in form it is with A, is intended to secure a benefit to *B*, so that *B* is entitled to say he has a beneficial interest as *cestui que trust* under that contract; then *B* would, in a Court of Equity, be allowed to insist upon and enforce the contract'."

In the present case, because of the fact that the respondent has taken upon itself in the relevant endorsement to pay the applicant direct in respect of money arising to be paid under the policy, and the fact that the insurance policy was in fact effected for the applicant's benefit, the respondent should be regarded as trustee and/or agent for the applicant. Thus, in *Halsbury's* Laws of England, 3rd Edition, Volume 38, it is stated at page 809 that:

"When a person has property or rights which he holds or is bound to exercise for or on behalf of another or others, or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights in trust for that other or those others, or for that purpose or those purposes, and he is called a trustee. A trust is a purely equitable obligation and is enforceable only in a court in which equity is administered."

Again, at page 822, in dealing with the question of trust in respect of contracts for the benefit of third parties, *Halsbury* states:

"There may be a trust of a contract. If one of two contracting parties contracts expressly as trustee for another person, that third person can enforce the trust. A clear intention to create such a trust must be shown to render it enforceable."

Thus, although as a general rule, a contract cannot be enforced except by a party to the contract, in my view, this case comes within the exceptions to that rule and the applicant is entitled to institute claims against the respondent in its own name.

Under the circumstances, it is my finding that the applicant has rights co-extensive as the said insured Choong Kok Hing in instituting claims in its own name against the respondent arising out of loss of the subject matter, upon which coverage was provided by the respondent by virtue of the endorsement dated June 29, 1968 appearing in the insurance policy. Judgment is, therefore, entered for the applicant in the above terms with costs.

Order accordingly.

Solicitors: *Allen & Gledhill; Shook Lin & Bok.*

LEE HOCK NING v. GOVERNMENT OF MALAYSIA

[F.C. (Ong C.J. (Malaya), Gill and Ong Hock Sim F.JJ.) March 23, 1972]

[Ipoh — Federal Court Civil Appeal No. 66 of 1970]

Contract — Building contract — Breach of — Action against Government to recover monies due and owing — Whether Government protected by statute — Public Authorities Protection Ordinance, 1948, s. 2.

Public Authorities — Limitation of time for filing proceedings — Claim under contract — Contract incidental to public duty — Public Authorities Protection Ordinance, 1948, s. 2.

This appeal concerned the non-payment of monies due and owing under a series of building contracts entered into between the appellant, a building contractor, and the Government of Malaysia.

In the court below, the respondent pleaded section 2 of the Public Authorities Protection Ordinance, 1948. In the result, the learned trial judge merely referred to section 38 of the Government Proceedings Ordinance, 1956, as importing the special period of limitation to the proceedings before him. He accordingly held that the appellant's claim was barred to the extent of $10,749.25.

The building contractor appealed.

Counsel for the respondent contended that as the contract for the building of schools was entered into in the performance of a public duty or was incidental thereto, section 2 of the Public Authorities Protection Ordinance, 1948, applied, so that the action should have been brought within 12 months next after the act, neglect, or default complained of in relation to that contract.

Held, allowing the appeal: (1) the non-payment of monies was not in pursuance of a public duty. Consequently, it could not have come within the provisions of section 2 of the Public Authorities Protection Ordinance, 1948. It is immaterial that the contract may have been entered into for the purpose of performing a statutory duty. If the act complained of is the breach of a contract, the statutory protection of the Ordinance cannot be invoked on the ground that the contract was entered into for the purpose of carrying out duties imposed by the statute;

(2) therefore, judgment must be entered for the appellant in the total sum of $14,589.75 with interest at 6% *per annum.*